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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1110

MICHAEL J. STAVOLA,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 30-3, Respondent, the State of New Jersey, respectfully submits, in addition to Petitioner's Statement of the Case, the following factual recitation in order to present an accurate and concise view of the matter involved herein.

Petitioner, Michael J. Stavola, was indicted by the Monmouth County Grand Jury on charges of assault and battery on a police officer and obstructing a police officer in the execution of his official duty. The convictions, which are the subject matter of the within petition, are the result of an attempt to influence the prosecution of the aforementioned indictment.

Petitioner Stavola and co-defendant Joseph Martinelli were indicted by the State Grand Jury and charged with the offenses of conspiracy, attempting to induce a State Police Officer to engage in misconduct in office bribery of said

State Trooper and obstruction of justice. Petitioner Stavola was found guilty of bribery and obstruction of justice and acquitted on the remaining counts. The jury also found co-defendant Martinelli guilty of inducing misconduct in office, as well as bribery and obstruction of justice.

Petitioner does not controvert the fact that he gave a New Jersey State Trooper $5,000 in order to influence the outcome of the then pending indictment charging assault and battery and interference with a police officer. Rather, it is claimed that Petitioner's alleged entrapment defense entitled him to an acquittal as a matter of law. Indeed, it is here asserted that the police conduct was so outrageous as to constitute a violation of due process. The facts of this case belie such a contention.

Detective James Sweeney of the New Jersey State Police was the central figure in Petitioner's attempt to influence the outcome of the pending criminal litigation. Sweeney's first inkling of what was to transpire occurred during a conversation with co-defendant Martinelli on December 17, 1970. During that conversation Martinelli euologized co-defendant Stavola. Martinelli informed Sweeney that if anyone could help Stavola he would be able to "write (his) own ticket."

Subsequent to this conversation, Trooper Sweeney was equipped with an on-body recording device and other recording equipment in order to preserve the substance of later conversations between himself, Petitioner Stavola and Martinelli.

On the evening of December 17, 1970, Sweeney conversed by telephone with Martinelli. During this conversation Martinelli indicated, "No listen, if you could do something on that old buddy, I'll light a candle for you every morning."

Martinelli introduced Sweeney to Petitioner Stavola on the following day, December 18, 1970, at a restaurant located in North Brunswick, New Jersey. Martinelli allegedly informed Stavola that Sweeney was "with the confidential squad or something like that." Stavola then related his version of the events leading to his indictment and its aftermath. The following portion of the conversation is most relevant in deter-

mining Stavola's predisposition and intent to commit the offenses charged:

Sweeney:	...I can't promise you nothing, that's all I can say.
Stavola:	That's all you can say.
Martinelli:	Mike, Mike, I told him whatever it is let me know, you know what I am talking about.
Stavola:	It's just half-assed all the way down the line but it's gotten to the stage. (laugh)
Sweeney:	Look, you've gotten to the stage right now where your (sic) going to have to do something.
Stavola:	*Allright.*
Sweeney:	*Is it all right with you with the arrangements I made with him then?*
Stavola:	*Whatever.*
Martinelli:	*I told him whatever it is to let me know.*
Stavola:	*Yeah.* (emphasis supplied)

Martinelli telephoned Sweeney on January 7, 1971, in order to ascertain what progress, if any, had been made in attempting to "fix" Stavola's case. Sweeney indicated that he was making progress. Martinelli again telephoned Sweeney on January 23, 1971 and inquired as to his progress in "fixing" the case. Sweeney stated that he could not talk at that juncture. Again, on February 12, 1971, Sweeney received a call from Martinelli. Sweeney requested a meeting with Martinelli and Stavola.

On February 23, 1971, Martinelli telephoned Sweeney and "reveals for the first time an interest in personally benefiting monetarily from this deal." Pa 8.[1]

1. "Pa" refers to Petitioner's appendix.

A meeting was arranged for later that day at the Carriage House Restaurant. At this meeting Martinelli indicated that he had had some difficulty with Stavola because he had not received a Christmas bonus. Martinelli then informed Sweeney that the money to fix Petitioner Stavola's case would come from the principal, *i.e.*, Stavola. He further noted that Stavola was aware of the arrangements and had requested Martinelli to meet with Sweeney.

On February 25, 1971, Sweeney and Martinelli again met in the parking lot of the Carriage House Restaurant. "Martinelli appeared to be prompting Sweeney to impress Stavola with the seriousness of the situation...." Pa 8. The prompting seemed "to be the result of Martinelli's desire to jack the price up so that he and Sweeney could skim a profit out of the deal." Pa 9

At the conclusion of the conversation Martinelli entered the restaurant and returned with Stavola. Sweeney indicated to Stavola the seriousness of his situation, a potential ethnic bias and the alleged penalty attached to the offense in question. Stavola and Sweeney then discussed the price for fixing the former's case. It was agreed that they would meet the following day at the Holiday Inn in Princeton, New Jersey.

The following day Stavola and Sweeney met and conversed in the parking lot. During that conversation petitioner Stavola said:

> Stavola: Gee, yeah, here, here's the thing. I feel this, *I do a lot of business with a different jobs and they, they cross a few bucks here and there, its a way of life and I'd rather have it,* like with me and you but when I leave you. (emphasis supplied)

Stavola and Sweeney then haggled over the amount of money that *he*, Stavola, would pay. Stavola agreed to pay $5,000 for the judge, $5,000 for a prosecutor and $5,000 for the "middle man." Stavola then continued by stating that:

> "Stavola: – (inaud), they only know me as Mike Stavola and nothing else and I couldn't begin to tell ya of my other deals that I've had in other than my word

is bond, I'll tell ya what I'll do with ya before I leave tonight I'll give you five." Pa9 and 10.

Sweeney and Stavola met that evening at the Colts Neck Inn. Petitioner Stavola gave Trooper Sweeney $5,000 and then left the scene.

At the trial, Sweeney affirmatively stated that he did not refuse, or accept Martinelli's offer to help Stavola out of his difficulties since, "if it were in fact a bribe offer I would have pursued it in hopes of arresting him for attempting to bribe a State Trooper." (1T229-4 to 6). Throughout the trial Sweeney never deviated from the fact that he was playing the role of a "crooked cop" and that he was attempting to ascertain if Stavola was in fact seeking to have his case "fixed." (1T293-8 to 12; 1T399-1 to 11; 1T539-17 to 20).

On the basis of the foregoing facts, Petitioner was convicted of bribery and obstruction of justice. The convictions were affirmed by the New Jersey Superior Court, Appellate Division on August 3, 1973. The New Jersey Supreme Court denied Certification on October 2, 1973. Thereafter, Petitioner filed a petition for writ of certiorari to the Appellate Division, Superior Court of New Jersey.

ARGUMENT

POINT I

THE DEFENSE OF ENTRAPMENT IS NOT OF CONSTITUTIONAL DIMENSION AND THE POLICE CONDUCT IN THIS CASE COMPORTED WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Despite its recent vintage Petitioner implores this Court to reverse its well considered opinion of *United States v. Russell*, 411 *U.S.* 423, 93 *S.Ct.* 1637 (1973). The Petitioner urges that this Court wrongly decided *Russell* by finding that the defense denominated as "entrapment" is not of constitutional magnitude, and therefore, inapplicable to the states through the due process laws of the Fourteenth Amendment. The only inference which may be gleaned from the question presented by Petitioner is that, in his view, this Court hastily decided *Russell* and is now predisposed to overturn its holding barely nine months after its rendition. The State of New Jersey submits that the issue raised by Petitioner obviously lacks merit, especially in view of the fact that it has been recently decided adversely to him by this Court. In addition, as this Court indicated in *Russell*, the defense of entrapment has no nexus to any of the enumerated amendments contained in the Bill of Rights and should not be subsumed therein. Lastly, the conduct in the instant case was compatible with the dictates of the due process clause of the Fourteenth Amendment.

Petitioner's principle contention is that the defense of entrapment should be incorporated within the Fifth Amendment's due process provision and made applicable to the states through the Fourteenth Amendment. It would then necessarily follow, according to Petitioner, that the states would be compelled to enter judgments of acquittal in those cases where government agents or police officers unduly enmeshed themselves in a criminal enterprise. This strained interpretation of the Bill of Rights was laid to rest in *United States v. Russell, supra*. There this Court rejected the contention advanced herein that the defense of entrapment is constitutionally grounded in the due process clause of the

Fifth Amendment. 92 *S.Ct.* at 1642 and 1643. In response to the contention that the exclusionary rule should be applicable to entrapment situations the Court held:

> "But he would have the Court go further in deterring undesirable official conduct by requiring that any prosecution be barred absolutely because of the police involvement in criminal activity. The analogy is imperfect in any event, for the principle reason behind the adoption of the exclusionary rule was the government's 'failure to observe its own laws.' (citation omitted). Unlike the situations giving rise to the holdings in *Miranda*, the government's conduct here violated no independent constitutional right of the respondent." 93 *S.Ct.* at 1642.

Thus, the defense of entrapment is not of constitutional magnitude.

Petitioner also seeks to broaden the defense of entrapment so that it would be made applicable to the states when it is found that the criminal conduct would not have been possible had not the government actively participated in the transaction. Again, *Russell* is dispositive. There this Court declined to overrule *Sherman v. United States*, 356 *U.S.* 369 (1958) and *Sorrells v. United States*, 287 *U.S.* 345 (1932). Those cases established the well-settled doctrine that a defense of entrapment would only succeed where it may be shown that the defendant did not possess the requisite predisposition to commit the crime. Predisposition, and not governmental participation, is the test. The courts of New Jersey have adopted the *Sherman* and *Sorrells* criteria for determining the viability of an entrapment defense. See *State v. Dolce*, 41 *N.J.* 422, 430-32 (1964). Thus, the defense of entrapment is not of constitutional dimension, and therefore is not applicable to the states through the Fourteenth Amendment.

In *Russell*, this Court opined that it was not inconceivable that on some future date a situation would present itself where the conduct of law enforcement officials would be so "outrageous" that due process would absolutely bar prosecution. 93 *S.Ct.* at 1643. Nevertheless, this Court was unable

to find that the conduct in *Russell* was "outrageous" and "shocking to the universal sense of justice." *Ibid.* In *Russell*, the Federal Agent had supplied an ingredient essential to the manufacture of a drug in return for half of the output. Defendant was then charged with violation of the drug laws.

In the instant case Petitioner is hardly able to characterize the conduct of Officer Sweeney as "outrageous". Therefore, the sole test to be applied in this case is whether defendant Stavola had the requisite predisposition to commit the offense in question. The Appellate Division of the Superior Court found that "while the criminal design may have originated with Martinelli that design was clearly adopted by Stavola on December 18, 1970." Pa12. The factual finding below conclusively mandates against a finding of entrapment. Officer Sweeney merely afforded Petitioner Stavola and co-defendant Martinelli the opportunity to commit the offenses in question. *Russell, supra*, 93 *S.Ct.* at 1644.

Petitioner's agency theory of entrapment must also fail. Relying essentially on *United States v. Klosterman*, 248 *F.* 2d 191 (3 Cir. 1957) and *United States ex rel. Hassell v. Mathues*, 22 *F.*2d 979 (E.D. Pa. 1927), Petitioner has constructed an agency theory whereby he seeks to charge the State of New Jersey with the actions of Martinelli as an agent of Trooper Sweeney. The argument is founded on the premise that a third party (Martinelli) can be induced by the State (Sweeney) to procure the commission of a criminal offense by a particular defendant (Stavola) without the third party having any knowledge of the government's objective. Petitioner's contrived theory is not applicable in this case.

As already noted, it has been found that defendant Stavola adopted Martinelli's criminal design on December 18, 1970. Therefore, *United States v. Klosterman, supra*, is factually distinguishable. In *Klosterman, supra*, the defendant had abandoned his original criminal plan. Nevertheless, the overreaching tactics of the police officials compelled the defendant to commit a crime he would otherwise not have committed. In the instant case there is no evidence indicative of Stavola's abandonment of his criminal design. Pa12. So too, the holding in *United States ex rel. Hassell v. Mat-*

hues, supra, is distinguishable. There it was found that the crime was wholly manufactured by the Government and that the government agent was unwillingly induced to entrap defendant. *Id.* at 479. Here, there is no evidence to establish that Martinelli was entrapped. Therefore, it was not at the State's direction that Martinelli approached Stavola. He was propelled by his own avarice. See: Orfield, "The Defense of Entrapment in the Federal Courts," 1967 Duke L. J. 39, 45; and Note, 45 *B.U.L. Rev.* 542, 563-64 (1965). For other holdings in the federal courts sustaining the respondent's view see: *United States v. Comi*, 336 *F.*2d 856 (4 Cir.), *cert.* den. 379 *U.S.* 992 (1964); *United States v. Romana*, 278 *F.*2d 202, 204 (2 Cir. 1960); *Crisp v. United States*, 262 *F.*2d 78 (4 Cir. 1958); *United States v. Perkin*, 190 *F.*2d 49 (7 Cir. 1951); and *Polski v. United States*, 33 *F.*2d 686 (8 Cir.), *cert.* den., 280 *U.S.* 591 (1929). See also, Donnally, "Judicial Control of Informants", 60 *Yale L.J.* 1108.

On the basis of the foregoing, the State of New Jersey submits that the defense of entrapment should not be incorporated into the Bill of Rights and made applicable to the state courts through the due process clause of the Fourteenth Amendment. Further, the law enforcement conduct here stopped far short of violating "that fundamental fairness, shocking to the universal sense of justice" mandated by the due process clause of the Fifth Amendment. *Russell, supra,* 93 *S.Ct.* at 1643.

POINT II

PETITIONER'S VARIOUS MOTIONS FOR SEVERANCE WERE PROPERLY DENIED AND HE SUFFERED NO IRREPARABLE PREJUDICE.

Petitioner would have this Court grant certiorari on a totally unsupported assumption that he was denied a fair trial within the meaning of the due process clause of the Fourteenth Amendment by the trial court's failure to sever co-defendant Martinelli from the trial. That this contention falls short of the mark is readily apparent. The claim presented here is couched in "due process terms." Petitioner, like so many other litigants seeking relief in the federal courts, has tagged on to his claim of error the ritualistic label of "due process." In fact, the granting of a motion for severance is a discretionary act with the trial court. Clearly, it is not of a constitutional hue. The denial of a severance motion will not warrant a reversal unless it is known that the trial court has committed a gross abuse of discretion. See *State v. Yormark*, 117 *N.J. Super.* 315 (331, 332) (App. Div. 1971), certif. den. 60 *N.J.* 138 (1972), *cert.* denied 408 *U.S.* 925 (1972). Therefore, absent a showing that petitioner has suffered a deprivation of his Fifth or Sixth Amendment rights the question of severance must be left to the state courts.

The crux of Petitioner's severance claim is that the joint trial caused his entrapment defense to suffer irreparably. It is asserted that Stavola's defense was based upon two theories of entrapment. "First, that Sweeney entrapped him on February 25, 1971, when Sweeney said he would make a deal with the judge and the prosecutor. Second, he was entrapped by Martinelli, who as Sweeney's agent, conveyed that Sweeney would make a 'deal' for him." P14. As has already been related, the New Jersey Superior Court, Appellate Division found that Sweeney did not entrap Stavola on February 25, 1971. Rather, the court found that while the criminal design may have originated with Martinelli, that design was clearly adopted by Stavola on December 18, 1970 and never abandoned thereafter. Therefore, both alleged theories of entrapment are factually precluded. Even assuming that the entrapment

defense was viable, the trial court properly admitted conversations between Martinelli and Sweeney with limiting instructions sufficient to preclude any prejudice.

Rule 63(9) of the *New Jersey Rules of Evidence* allows admission at trial of statements made by a party while participating in a plan to commit a crime or civil wrong, so long as the statement was made in furtherance of that plan. This *Rule* is similar to that in many other jurisdictions. See Garland and Snow, "The Co-conspirators Exception To The Hearsay Rule: Procedural Implementation and Confrontation Clauses Requirements." 63 *J. Crim. L.* and *P.S.* 1 (1972). The case law in this jurisdiction and elsewhere affirms the use of the co-conspirator exception rule even when a conspiracy is not charged. See, *e.g.*, *Dutton v. Evans*, 400 *U.S.* (1970), and *State v. Rios*, 17 *N.J.* 372 (1955). Thus, although the jury returned a not guilty verdict as to the conspiracy count, Martinelli's statements as they related to Stavola were properly admitted. In *Dutton v. Evans, supra*, this Court held that the co-conspirator hearsay exception does not violate the confrontation clause of the Sixth Amendment. Therefore, there is no constitutional issue as to the admission of these statements.

As to those statements which did not relate to Stavola, the trial court on several occasions instructed the jury that these conversations could only be used as evidence against Stavola if it was first determined that a conspiracy existed. In the course of its charge to the jury the court again "alluded to this principle of law." See Pa17. Therefore, Martinelli's statements as they related to Stavola were properly admitted under the co-conspirator exception prior to the jury's determination of whether a conspiracy conviction was warranted. The trial court's instructions limited the jury to consideration of these statements only if such a conspiracy was found to exist

Petitioner lastly complains of the trial court's failure to give Petitioner Stavola's requested instruction regarding the question of whether Martinelli was Trooper Sweeney's agent for the purpose of passing on the entrapment defense. The Appellate Division of the Superior Court correctly disposed

of this allegation when it found that the testimony "clearly indicates that Martinelli originated the criminal design in October, 1970; he was not acting on behalf of the State Police. *Cf. United States v. Romano*, 278 *F.*2d 202, 204 (2 Cir. 1960). Martinelli's criminal activity was adopted by Stavola no later than December 18, 1970, and was never thereafter abandoned by him. Hence the trial judge properly refused the requested instruction." See Pa12 and 13. Furthermore, since there was ample evidence demonstrating Stavola's predisposition to commit the crimes charged, the issue of entrapment was properly submitted to the jury for decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should not issue.

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